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January 7, 2000

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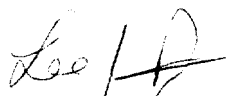
Re: MM Docket No. 88-577  
Biltmore Forest, North Carolina  
Response to Supplemental Brief

Dear Ms. Salas:

Transmitted herewith, on behalf of Orion Communications Limited, is an original and fourteen (14) copies of its Response to Supplemental Brief in the above-referenced Commission proceeding.

Please contact the undersigned in the event the Commission has any questions with respect to the filing of this Response to Supplemental Brief.

Sincerely,



Lee J. Peltzman  
Counsel for

ORION COMMUNICATIONS LIMITED

Enclosure

cc: Stephen Leckar, Esq. (w/encl.)

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In re Applications of	)	MM Docket No. 88-577
	)	
LIBERTY PRODUCTIONS,	)	File No. BPH-870831MI
A LIMITED PARTNERSHIP	)	
	)	
WILLSYR COMMUNICATIONS	)	File No. BPH-870831MJ
LIMITED PARTNERSHIP	)	
	)	
BILTMORE FOREST	)	File No. BPH-870831MK
BROADCASTING FM, INC.	)	
	)	
SKYLAND BROADCASTING	)	File No. BPH-870831ML
COMPANY	)	
	)	
ORION COMMUNICATIONS	)	File No. BPH-870901ME
LIMITED	)	
	)	
For a Construction Permit for a New	)	
FM Broadcast Station on Channel 243A	)	
at Biltmore Forest, North Carolina	)	

To: The Commission

**RESPONSE TO SUPPLEMENTAL BRIEF**

Orion Communications Limited ("Orion"), by its counsel, hereby submits its Response to the Supplemental Brief of Liberty Productions, a Limited Partnership ("Liberty"). This Response is filed pursuant to the Commission Order, FCC 99I-23, released November 23, 1999. In support of its position, Orion submits the following:

A brief recitation of the relevant facts is essential for resolution of this case. This proceeding was designated for hearing by Hearing Designation Order, 4 FCC Rcd 706 (Mass Media Bureau 1989). By Memorandum, Opinion and Order, FCC 89M-1025, released March 30, 1989, the Presiding Administrative Law Judge added site availability and false certification issues against the application of Liberty. Liberty was given the burden of proof under both

issues. In his Initial Decision, the Presiding Judge concluded that Liberty had failed to demonstrate reasonable assurance of the availability of its proposed tower site and that its principal, Valerie Klemmer, had falsely certified the proposed site's availability to the Commission:

The record clearly justifies the conclusion that when Valerie Klemmer represented to the Commission that Liberty had available the transmitter site specified in their application, she had absolutely no basis for doing so. Moreover, she knew that she had no basis for so certifying. To argue that her feeble, half-hearted effort to obtain some of Vicky Utter's land on Busbee Mountain constitutes "reasonable assurance" strains credulity. No, Valerie Klemmer has blatantly dissembled in a manner that doesn't fit a prospective broadcast permittee. [citation omitted] Simply stated, Liberty has shown that it doesn't possess the necessary character qualifications to be a Commission licensee, and its application must be denied.<sup>1</sup>

The Presiding Judge's findings and conclusions were based on the verified statements and deposition testimony of the site owner, Vicky Utter.

The Commission's Review Board subsequently affirmed the Presiding Judge's conclusion that Liberty did not demonstrate reasonable assurance of the availability of its proposed site.<sup>2</sup> Since it disqualified Liberty on the site issue, the Review Board had no need to resolve the issue of whether Liberty had also misrepresented to the Commission when it certified that its transmitter site was available.<sup>3</sup> The Board accepted the testimony of Vicky Utter, concluding that there was "no reason in the record to reject the firm denial of the site owner that she had ever given assurance to Liberty that the property would be available . . ."<sup>4</sup> Therefore, the Review Board affirmed Liberty's disqualification.

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<sup>1</sup> National Communications Industries, 5 FCC Rcd 2862, 2866-67 (ALJ 1990).

<sup>2</sup> National Communications Industries, 6 FCC Rcd 1978, 1979 (Rev. Bd. 1991).

<sup>3</sup> Id.

<sup>4</sup> Id.

Liberty sought review of the Review Board's disqualification. The Commission twice considered Liberty's arguments and twice rejected them, expressly affirming Liberty's disqualification on the site availability issue.<sup>5</sup>

The law of this case then is that, despite the representation of its general partner to the Commission, Liberty lacked reasonable assurance of its proposed site at the time it filed its application. The Presiding Judge so concluded, the Commission Review Board so held, and the Commission itself so concluded -- twice. Liberty may not re-litigate that issue now.

But that is exactly what Liberty seeks to do in this proceeding. Although it offers no new evidence in support of its arguments, it contends throughout its Supplemental Brief that Liberty had reasonable assurance and, therefore, its site certification could not have been false.<sup>6</sup> Since the Commission has consistently held that Liberty lacked reasonable assurance, it may not reverse itself now, based on no new evidence, and accept Liberty's contention that reasonable assurance was present. As such, all Liberty's arguments based on that premise must be rejected outright.

Moreover, a comparison of the Supplemental Brief and other pleadings filed by Liberty challenging the Initial Decision demonstrates that Liberty is once again making arguments which have already been rejected at all levels of the Commission. These arguments should not be considered anew by the Commission. Thus, Liberty continues to claim that the Presiding Judge

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<sup>5</sup> National Communications Industries, 7 FCC Rcd 1703 (1992); Liberty Productions, a Limited Partnership, 7 FCC Rcd 7581, 7586 (1992). As noted above, in affirming the disqualification of Liberty, the Commission rejected the same arguments that Liberty now makes in its Supplemental Brief ("Liberty challenges its disqualification on the transmitter site issue [arguing] as it did in its Application for Review, that the Board overlooked the testimony of Tim Warner, which allegedly corroborates the claim that Vicky Utter orally agreed to lease the site to Liberty's principal, Valerie Klemmer." 7 FCC Rcd at 7586).

<sup>6</sup> Supplemental Brief of Liberty Productions, a Limited Partnership, filed December 23, 1999, at pp. 11, 13, 16.

prejudged the issues in this proceeding.<sup>7</sup> Liberty unsuccessfully made similar arguments to both the Review Board<sup>8</sup> and the Commission.<sup>9</sup>

Liberty additionally claims in its Supplemental Brief that the Initial Decision “relied upon the unreliable and noncredible testimony of Vicky Utter . . . and failed to address or in most instances even to acknowledge the more credible, detailed and reliable testimony of Liberty’s General Partner, Valerie Klemmer Watts, [and] the significant testimony of Tim Warner.”<sup>10</sup> Liberty unsuccessfully proffered similar arguments to the Review Board<sup>11</sup> and the Commission.<sup>12</sup>

Thus, Liberty’s claim in its Supplemental Brief summary that the Initial Decision was unsupported and unreliable must be rejected since all of its arguments ((1) the Presiding Judge predetermined the issues prior to hearing, (2) his decision was premised upon the unreliable and noncredible testimony of the site owner, and (3) his decision ignored the more detailed and

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<sup>7</sup> Supplemental Brief at pp. 2-4. (“This blatant pre-judging of issues . . . denied Liberty the impartial consideration of the evidence to which it was entitled . . .”).

<sup>8</sup> Exceptions and Brief of Liberty Productions, a Limited Partnership, filed June 4, 1990 (“Exceptions”), at p. 3 (“The Presiding Judge prejudged the site availability and false certification issues he added against Liberty.”).

<sup>9</sup> Liberty Productions, a Limited Partnership, Petition for Reconsideration (“Petition for Reconsideration”), filed March 30, 1992, at p. 2 (“The ALJ’s treatment of the issues supported Liberty’s contention that he had predetermined the outcome of the proceeding.”).

<sup>10</sup> Supplemental Brief at pp. 4-5.

<sup>11</sup> Exceptions at p. 7 (“The testimony of Ms. Utter, upon which the Presiding Judge relied, is replete with conflict [while] the Presiding Judge failed to address or consider the more extensive and detailed testimony of Valerie Klemmer [and] complete ignored the significant testimony of Tim Warner . . .”) See also pp. 10-15.

<sup>12</sup> Liberty Productions, a Limited Partnership, Application for Review, filed May 8, 1991, at pp. 5, 8 (“The site owner’s testimony . . . was replete with contradiction and admittedly the production of an inadequate recollection [while] testimony of Ms. Klemmer and Mr. Warner clearly establishes that Liberty had obtained reasonable assurance of the availability of its transmitter site prior to filing its application.”); Petition for Reconsideration at pp. 6, 9.

reliable testimony of Liberty's witnesses) have all been previously considered by the Commission and rejected. The purpose of this Supplemental Brief is not to re-litigate issues which have already been repeatedly heard over the past decade. In making its argument, Liberty attempts to focus on an adverse Initial Decision.<sup>13</sup> However, its real complaint is not with the Initial Decision, but with the Review Board decision and two Commission decisions affirming adverse conclusions made therein. Without asserting that it is attempting to re-litigate the law of the case, it is nevertheless plainly doing so. Its arguments are no more acceptable the fourth time around than when they were made initially.

Moreover, contrary to Liberty's claims, its arguments have been correctly rejected by the Review Board and Commission. In view of the testimony of Vicky Utter, it is clear that Liberty has failed to carry its burden of proof with respect to both the site availability and certification issues. Ms. Utter has consistently denied ever giving Liberty permission for use of her site. On February 22, 1989, Ms. Utter executed an affidavit stating that she was "certain that I did not give any assurance to Ms. Klemmer or to any representative of Liberty that my property would be available to it." (Liberty Ex. 6, pp. 1-2 (emphasis in original).) In a later, March 27, 1989, statement, Ms. Utter added that "I never gave Valerie the promise or assurance that she could use my land or my name when she filed the application with the FCC. If we had discussed this or I had give her this assurance, I certainly would have remembered and I would have been looking for her to make a commitment of some sort." (Liberty Ex. 8.) At her deposition, Ms. Utter described a meeting with Valerie Klemmer and Tim Warner which is completely contrary to their testimony. According to Ms. Utter, the three stood in her yard informally and made small talk for a few minutes. (Liberty Ex. 13, p. 25.) Contrary to the testimony of Valerie Klemmer,

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<sup>13</sup> Supplemental Brief, Summary ("The Initial Decision is unsupported and unreliable . . .").

Ms. Utter stated that Klemmer did not call her in advance, but simply came by when she was working in her yard. (Liberty Ex. 13, p. 25). The three discussed the fact that Ms. Utter had leased property to Brian Lee. (Liberty Ex. 13, pp. 25-28, 40.) And Ms. Utter was clear that there was no discussion with respect to Valerie Klemmer or Liberty utilizing her land for a tower site. (Liberty Ex. 13, pp. 27, 28, 43.) This should be contrasted with Ms. Utter's memory that other individuals had called her in August 1987 about the possibility of leasing her property for a tower site for the new FM station. (Liberty Ex. 13, pp. 21-22.)<sup>14</sup>

Liberty has repeatedly stated throughout this proceeding that Ms. Utter's testimony is unreliable and should be disregarded. It attempts to impugn her testimony by claiming that it is inconsistent and that its content was influenced by Brian Lee and Orion's attorney. However, a review of Ms. Utter's deposition testimony and her statements shows that there are few relevant inconsistencies present. Liberty attempts to make much of the fact that Ms. Utter mistakenly stated in her February 22, 1989 statement that she did not know Valerie Klemmer and had never spoken to her. Yet, neither Ms. Klemmer nor Mr. Warner represented to Ms. Utter at their meeting that they represented Liberty, and even Mr. Warner acknowledged that he did virtually all of the talking at their meeting. (Tr. 872, 918, 921) Liberty claims that Orion unduly influenced Ms. Utter's testimony and statements, yet Ms. Utter stated in her deposition that it was Tim Warner who kept "insisting" and was "adamant" that Ms. Utter had misremembered the discussions about possibly leasing Liberty a piece of her land. (Liberty Ex. 13, pp. 40, 41, 42). Liberty points to no evidence that anybody associated with Orion ever pressured Ms. Utter to make any statement. The fact that Ms. Utter spoke with Orion's counsel and that they discussed

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<sup>14</sup> Even Liberty's witnesses were forced to acknowledge that neither Ms. Klemmer nor Mr. Warner told Ms. Utter that Liberty would be specifying her name in its application (Tr. 965).

the content of her statement was not improper and renders this case no different than other proceedings and parties, including Liberty. See Tr. 965-966. (Tim Warner<sup>15</sup> acknowledges that counsel assisted in his written testimony).

In sum, the testimony of Vicky Utter establishes that Liberty did not have reasonable assurance of the availability of its proposed tower site at the time that it filed its application. South Florida Broadcasting, Inc., 99 FCC 2d 840 (Rev. Bd. 1984). For the same reason, Liberty's site certification was false.

The Commission has long expected full candor from its applicants and licensees. This concern "stems from the necessity of relying on licensees' representations to the Commission." Fox River Broadcasting, Inc., 93 FCC 2d 127, 130 (1983). Misrepresentation and lack of candor both require the element of willfulness. See Bluegrass Broadcasting Co., 43 FCC 2d 990, 994 (1973). In this case, there was abundant motive for Liberty to deceive by falsely certifying its site availability. See The Old Time Religion Hour, Inc., 54 RR 2d 989, 996 (Rev. Bd. 1983). Liberty needed to specify a tower site in an application, which had to be filed in only a few days. Ms. Utter's property was one of the few tower sites that was technically feasible for a site. Liberty contacted no other property owners. (Tr. 879, 957) Thus, in view of the upcoming filing deadline and the difficulty in obtaining a good site, Liberty had no realistic choice but to specify the Utter property. And, once Orion filed a Petition to Enlarge Issues against the Liberty application, Liberty had no choice but to persuade Ms. Utter that she had a failing memory and that what, at most, had been a vague conversation was really a firm commitment on its part.

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<sup>15</sup> Mr. Warner, good friend and neighbor to Valerie Klemmer and her husband at the time, is hardly the disinterested witness portrayed by Liberty (Tr. 716).



Moreover, in this case, this Presiding Judge had the opportunity to observe the testimony of Liberty's witnesses. Commission precedent requires that the credibility findings of an ALJ be given decisional deference unless those findings are in irreconcilable conflict with the record evidence. Opal Chadwell, 2 FCC Rcd 5502, 5504 (Rev. Bd. 1987), remanded on other grounds, FCC 89-7, released January 31, 1989; Broadcast Associates of Colorado, 104 FCC 2d 1619 (1986) ("[a]bsent extrinsic evidence to the contrary, we believe that [an] ALJ's judgment . . . is entitled to great weight."); Signal Ministries, Inc., 104 FCC 2d 1481, 1486 (Rev. Bd. 1986) ("[i]n the absence of patent conflicts with the record evidence, the Commission accords special deference to a presiding officer's credibility findings since the trier of fact has a superior opportunity to observe and evaluate a witness's demeanor and to judge his/her credibility."). Thus, the authorities are in consensus in holding that some real and legally recognizable deference is to be accorded to credibility findings of an ALJ unless "reversal is supported by substantial record evidence." WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1141 (D.C. Cir. 1985).

In this case, there is no extrinsic evidence which would lead to a conclusion contrary to the Presiding Judge's adverse determination regarding the site certification issue. Such deference to his conclusions is clearly warranted here. See also The Old Time Religion Hour, Inc., 54 2d at 996 (Commission accords deference to an ALJ's credibility determination disqualifying an applicant for misrepresentation).

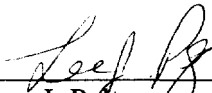
Accordingly, for the reasons stated above, the false certification issue in this proceeding must be resolved against Liberty. It has failed to satisfy its burden of proof. Liberty must be disqualified and its application denied.

Respectfully submitted,

ORION COMMUNICATIONS LIMITED

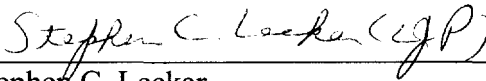
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January 7, 2000

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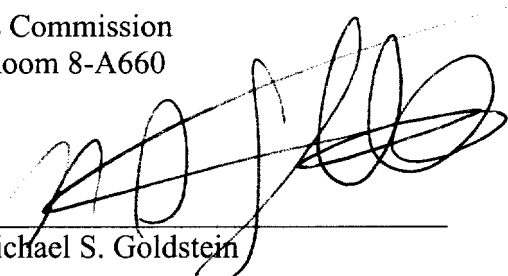
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